

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ROBERT HEATH,	)	
	)	
Plaintiff,	)	
	)	No. CV-05-548-HU
v.	)	
	)	
JOANNE B. BARNHART,	)	
Commissioner of Social	)	
Security,	)	OPINION & ORDER
	)	
Defendant.	)	
_____	)	

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1 - OPINION & ORDER

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5 HUBEL, Magistrate Judge:

6 Plaintiff Robert Heath brings this action for judicial review  
7 of the Commissioner's final decision to deny disability insurance  
8 benefits (DIB) and supplemental security income (SSI). This Court  
9 has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3). Both  
10 parties have consented to entry of final judgment by a Magistrate  
11 Judge in accordance with Federal Rule of Civil Procedure 73 and 28  
12 U.S.C. § 636(c).

13 For the reasons set forth below, the Commissioner's decision  
14 is reversed and remanded for further administrative proceedings.

#### 15 PROCEDURAL HISTORY

16 Plaintiff applied for DIB and SSI on February 4, 1999. Tr.  
17 6<sup>1</sup>, 23, 66-69. His applications were denied initially and on  
18 reconsideration. Tr. 6, 54, 60.

19 On November 13, 2000, plaintiff, represented by counsel,  
20 appeared for a hearing before an Administrative Law Judge (ALJ).  
21 Tr. 673-98. In a May 23, 2001 decision, the ALJ found plaintiff  
22 not disabled. Tr. 593-600. On appeal, the Appeals Council  
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24 <sup>1</sup> The List of Exhibits at the beginning of the  
25 Administrative Record lists several documents related to  
26 plaintiff's SSI application, including the initial application,  
initial disability determination, and a reconsideration  
27 determination. Tr. 6. A handwritten note states that "SSi [sic]  
Document [sic] are not Available for Inclusion." Id. Since  
28 these are documents over which there is no dispute, I do not  
concern myself with their absence.

1 determined that the ALJ had failed to properly assess the weight  
2 given to various medical reports and failed to provide an adequate  
3 rationale for concluding that there were no work-related  
4 limitations. Tr. 628-30. The Appeals Council concluded that the  
5 ALJ's finding that plaintiff had no severe impairment, was not  
6 supported by the current evidence of the record. Id. The Appeals  
7 Council remanded the case back to the ALJ.

8 A different ALJ conducted a second hearing on August 6, 2002.  
9 Tr. 699-741. Plaintiff was again represented by counsel. Id. On  
10 November 7, 2002, the ALJ issued a decision finding plaintiff not  
11 disabled. Tr. 635-46.

12 On July 11, 2003, the Appeals Council remanded the case back  
13 to the ALJ for three purposes: (1) to obtain additional evidence  
14 regarding plaintiff's musculoskeletal conditions<sup>2</sup>; the additional  
15 evidence could include, if warranted and available, a consultative  
16 orthopedic examination and medical source statements about what  
17 plaintiff can still do despite his impairments; (2) to obtain  
18 evidence from a medical expert, if necessary, to clarify the nature  
19 and severity of the plaintiff's impairment; and (3) to obtain  
20 supplemental evidence from a vocational expert to clarify past  
21 relevant work and to determine whether the claimant had acquired  
22 any skills that are transferable to other occupations under the  
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24 <sup>2</sup> This was prompted by the Appeals Council's observation  
25 that new evidence indicated that the plaintiff fractured his  
26 right hip after the second ALJ hearing, possibly due to an  
27 osteoporosis condition. Tr. 651. The Appeals Council noted that  
28 while the undisplaced fracture was expected to heal, it was  
unclear whether the new condition would interfere with  
plaintiff's ability to perform medium work, as found in the ALJ's  
decision. Id.

1 guidelines in Social Security Ruling 82-41. Id.

2 Plaintiff appeared before an ALJ<sup>3</sup> for the third time, again  
3 with counsel, on April 22, 2004. Tr. 742-65. On August 24, 2004,  
4 the ALJ issued a decision finding plaintiff disabled beginning  
5 April 10, 2003, and continuing, but not disabled before that date.  
6 Tr. 18-40. The Appeals Council denied plaintiff's request for  
7 review of the ALJ's decision. Tr. 8-10.

#### 8 FACTUAL BACKGROUND

9 Plaintiff alleges disability, commencing September 30, 1989,  
10 based on post-traumatic stress disorder (PTSD), back pain, gout,  
11 and heart problems. Tr. 75. At the time of the third hearing, on  
12 April 22, 2004, plaintiff was fifty-four years old. Tr. 67. He is  
13 a high school graduate. Tr. 678. His past relevant work is as an  
14 auction yardman, tree planter, construction millwright, automobile  
15 technician, and forklift operator. Tr. 37, 97, 758-69.

16 As explained below, plaintiff seeks to remand this case to the  
17 ALJ for failure to comply with the Appeals Council's July 11, 2003  
18 directives, and for failure to accurately infer the onset date of  
19 plaintiff's disability, as defined in the Social Security Act.  
20 Given the fairly narrow issues raised by plaintiff, I will address  
21 the relevant factual evidence in conjunction with a discussion of  
22 plaintiff's arguments.

#### 23 THE ALJ'S AUGUST 24, 2004 DECISION

24 The ALJ first determined that plaintiff had not engaged in any  
25 substantial work activity since his alleged September 30, 1989

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27 <sup>3</sup> The ALJ who conducted this third hearing was the same one  
28 who conducted the first hearing.

1 onset date. Tr. 25, 38. The ALJ found that plaintiff had severe  
2 impairments of PTSD, peripheral neuropathy, diabetes mellitus, and  
3 degenerative disk disease. Tr. 31, 39. However, he found that  
4 none of plaintiff's impairments, or combination of impairments, met  
5 or equaled a listed impairment. Id.

6 Next, the ALJ determined plaintiff's residual functional  
7 capacity. The ALJ concluded that as of April 10, 2003, plaintiff  
8 was limited to sedentary work due to difficulty with walking and  
9 standing. Tr. 36, 39. Prior to that date, however, the ALJ  
10 concluded that plaintiff retained the residual functional capacity  
11 to lift and carry fifty pounds occasionally and twenty-five pounds  
12 frequently, to sit for six hours in an eight-hour workday, and to  
13 stand and/or walk for six hours in an eight-hour workday, with no  
14 limitations related to pushing and pulling with his lower or upper  
15 extremities. Tr. 37, 39. In addition, plaintiff was limited to  
16 simple, routine, repetitive work that did not require more than  
17 occasional interaction with coworkers or the public. Id.

18 The ALJ, relying on the testimony of a vocational expert (VE),  
19 then determined that plaintiff was capable of performing his past  
20 relevant work as a forklift operator and janitor prior to April 10,  
21 2003. Id. After that date, however, because of the limitation to  
22 sedentary work, the ALJ determined that plaintiff was unable to  
23 perform his past relevant work. Id. When plaintiff's age,  
24 education, and work experience were examined in combination with  
25 his residual functional capacity, the ALJ found that Medical-  
26 Vocational Rule 201.14 ("the grids"), directed a conclusion of  
27 disability. Tr.39-40.

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## 1 STANDARD OF REVIEW &amp; SEQUENTIAL EVALUATION

2 A claimant is disabled if unable to "engage in any substantial  
3 gainful activity by reason of any medically determinable physical  
4 or mental impairment which . . . has lasted or can be expected to  
5 last for a continuous period of not less than 12 months[.]" 42  
6 U.S.C. § 423(d)(1)(A). Disability claims are evaluated according  
7 to a five-step procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395  
8 (9th Cir. 1991). The claimant bears the burden of proving  
9 disability. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir.  
10 1989). First, the Commissioner determines whether a claimant is  
11 engaged in "substantial gainful activity." If so, the claimant is  
12 not disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20  
13 C.F.R. §§ 404.1520(b), 416.920(b). In step two, the Commissioner  
14 determines whether the claimant has a "medically severe impairment  
15 or combination of impairments." Yuckert, 482 U.S. at 140-41; see  
16 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not  
17 disabled.

18 In step three, the Commissioner determines whether the  
19 impairment meets or equals "one of a number of listed impairments  
20 that the [Commissioner] acknowledges are so severe as to preclude  
21 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20  
22 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is  
23 conclusively presumed disabled; if not, the Commissioner proceeds  
24 to step four. Yuckert, 482 U.S. at 141.

25 In step four the Commissioner determines whether the claimant  
26 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),  
27 416.920(e). If the claimant can, he is not disabled. If he cannot  
28 perform past relevant work, the burden shifts to the Commissioner.

1 In step five, the Commissioner must establish that the claimant can  
2 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§  
3 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its  
4 burden and proves that the claimant is able to perform other work  
5 which exists in the national economy, he is not disabled. 20  
6 C.F.R. §§ 404.1566, 416.966.

7 The court may set aside the Commissioner's denial of benefits  
8 only when the Commissioner's findings are based on legal error or  
9 are not supported by substantial evidence in the record as a whole.  
10 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a  
11 mere scintilla," but "less than a preponderance." Id. It means  
12 such relevant evidence as a reasonable mind might accept as  
13 adequate to support a conclusion. Id.

#### 14 DISCUSSION

15 Plaintiff seeks to remand this case to the ALJ for alleged  
16 errors by the ALJ in not complying with the July 11, 2003 remand  
17 order from the Appeals Council, and in failing to properly assess  
18 his disability onset date. Plaintiff states that his disability is  
19 based on a combination of multiple physical and mental impairments  
20 and that his disability began on September 30, 1989, or some  
21 alternative date prior to April 10, 2003.

22 In regard to the July 11, 2003 Appeals Council remand order,  
23 plaintiff's specific argument is that the ALJ did not comply with  
24 the Council's directive regarding plaintiff's musculoskeletal  
25 condition. Tr. 651-52. As noted above, in its July 11, 2003  
26 Order, the Appeals Council remarked that after the August 2002  
27 hearing before the ALJ, plaintiff suffered a right hip fracture,  
28 possibly due to an osteoporosis condition. Id. Thus, it ordered

1 the ALJ, upon remand, to "[o]btain additional evidence concerning  
2 the claimant's musculoskeletal conditions" in order to "clarify the  
3 work restrictions associated with the musculoskeletal conditions."  
4 Id. It noted that the "additional evidence may include, if  
5 warranted and available, a consultative orthopedic examination and  
6 medical source statements about what the claimant can still do  
7 despite the impairments." Id. (emphasis added).

8 Plaintiff contends that the ALJ ignored the Appeals Council's  
9 order to investigate his musculoskeletal condition and thus, he  
10 violated his duty to fully and fairly develop the record.

11 In response, defendant contends that additional evidence was  
12 supplied by plaintiff's attorney, in three submissions prior to the  
13 third ALJ hearing, labeled Exhibits 16F, 17F, and 18F and found in  
14 the Administrative Record at Tr. 488-567, 568-80, and 581-92,  
15 respectively. Defendant states that the ALJ reviewed these records  
16 in his decision, and particularly addressed the right-side hip pain  
17 and fracture. Defendant states that the ALJ noted that the record  
18 as a whole indicated that plaintiff remained active, was able to  
19 stand or walk during much of the day, that his hip fracture healed  
20 without complication, and that there was progressive improvement in  
21 pain and ambulation.

22 Defendant argues that there are no other medical records to be  
23 obtained since plaintiff himself provided the most recent Veterans'  
24 Administration (VA)<sup>4</sup> records and identified no others. Defendant  
25 further argues that while the Appeals Council suggested that a  
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28 <sup>4</sup> Almost all of plaintiff's medical treatment has been  
provided by the VA.



1 consultative examination might be appropriate, such an examination  
2 would have provided a report of plaintiff's condition only as of  
3 the time of the examination. Because the ALJ found plaintiff  
4 disabled beginning April 10, 2003, which was before the Appeals  
5 Council's July 11, 2003 Order, it was not error to forgo another  
6 examination because a later examination would have served no useful  
7 purpose.

8 I agree with defendant. In his decision, the ALJ discussed  
9 the medical records submitted by plaintiff following the previous  
10 hearing in August 2002, and which cover plaintiff's medical  
11 treatment following his September 2002 hip fracture. Tr. 488-567  
12 (VA medical records from October 23, 2002, to August 22, 2003); Tr.  
13 568-580 (VA medical records from October 15, 2003); Tr. 581-92 (VA  
14 medical records from July 22, 2003).

15 The ALJ first discussed plaintiff's hip fracture as follows:

16 In October 2002, the claimant reported severe right-sided  
17 hip pain with an acute onset in August 2002. He reported  
18 no history of trauma or falls. An MRI showed a non-  
19 displaced intertrochanteric fracture of the right femur.  
20 (Exhibit 16F/79). The claimant agreed to non-weight  
21 bearing and to remain on crutches to prevent displacement  
22 of the fracture. (Exhibit 16F/74-75). The claimant  
23 underwent a number of tests to determine the cause of the  
24 fracture, which were all normal. However, an EMG in  
25 January 2003 showed moderate to severe peripheral  
26 neuropathy. (Exhibit 16F/72). By late January 2003, the  
27 claimant was doing well, with no significant or ongoing  
28 hip pain. He began weight bearing and refused physical  
therapy. (Exhibit 16F/71-73).

Tr. 29.

24 The ALJ then noted that in February 2003, during a  
25 hospitalization related to chest pain, plaintiff reported that his  
26 hip pain had resolved. Id. The ALJ then noted that later in  
27 February 2003, plaintiff was referred to endocrinology for  
28

1 evaluation of osteoporosis. Id. (citing Exh. 16F/34, 27, 5). As  
2 the ALJ explained, plaintiff was thought to be at high risk for  
3 osteoporosis, but he was started on treatment with Alendronate<sup>5</sup>,  
4 which he tolerated well. Id. The ALJ noted that the medical  
5 records indicated that plaintiff reported his hip pain at that time  
6 as "2/10" and he walked two to three blocks, three or four times  
7 per day. Id. (citing Exh. 1 6F/34).

8 Finally, in assessing plaintiff's residual functional  
9 capacity, the ALJ expressly noted that "it appears that the  
10 claimant's hip fracture in August 2002 healed without complication,  
11 and he was able to ambulate without crutches by January 2002 and  
12 reported resolved pain in February 2003." Tr. 36 (citing Exh.  
13 16F/53).

14 The record shows that the ALJ examined the subsequent medical  
15 evidence and thus, complied with the Appeals Council's order that  
16 additional evidence regarding the osteoporosis condition be  
17 obtained and reviewed. The record shows that the ALJ noted the  
18 relevant facts regarding plaintiff's hip, including the level of  
19 pain, the new prescription which he tolerated well, and his level  
20 of activity in regard to walking. Thus, the ALJ analyzed the  
21 relevant evidence and assessed the impact of the condition on  
22 plaintiff's ability to work. Moreover, as defendant notes, a  
23 consultative examination, which was suggested by the Appeals  
24 Council as only a possibility, would have provided an evaluation of  
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26 <sup>5</sup> Alendronate is used to treat osteoporosis by preventing  
27 bone breakdown and increasing bone density to make bones stronger  
28 and less likely to break. [http://www.nlm.nih.gov/medlineplus/  
druginfo/medmaster/a601011.html](http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a601011.html)

1 plaintiff as of a specific date in time, a time which fell after  
2 the April 10, 2003 date the ALJ determined as the disability onset  
3 date. Thus, even had the ALJ been obligated to obtain a  
4 consultative examination from an orthopedic specialist, his failure  
5 to do so was harmless because any information provided by the  
6 specialist would be relevant only to the period in which the ALJ  
7 had concluded plaintiff was disabled.

8 Next, plaintiff argues that the ALJ erred in determining that  
9 plaintiff became disabled as of April 10, 2003. I agree.

10 The ALJ noted plaintiff's assertion that his disability began  
11 in September 1989. Tr. 33. The ALJ remarked that there was very  
12 little objective medical evidence in the record of an ongoing  
13 medically determinable physical impairment or impairments that  
14 resulted in significant vocationally relevant limitations prior to  
15 the date plaintiff was last insured for DIB, December 31, 1995.  
16 Id. The ALJ also remarked that it did not appear that the  
17 plaintiff was diagnosed with PTSD until early 1996. Id.

18 The ALJ noted that plaintiff underwent numerous evaluations  
19 over the years related to his disability claim with the VA. Id.  
20 However, the ALJ explained, "those evaluations do not support the  
21 claimant's assertion of disability until the [VA] found the  
22 claimant 100% disabl[ed] as of April 10, 2003, based on evaluations  
23 performed in July 2003." Id. The ALJ noted that at that time, in  
24 addition to PTSD, plaintiff's physical impairments had worsened and  
25 there was evidence of peripheral neuropathy of his hands, as well

1 as his feet. Id. Also, the ALJ stated, claudication<sup>6</sup> was found.  
2 Id.

3 The ALJ then explained:

4 Dr. Acevedo opined that the claimant's physical  
5 impairments, including and particularly claudication,  
6 limited him to sedentary work that did not require good  
7 finger sensation. Dr. Holm opined that due to mental  
8 impairments, the claimant could not perform work  
9 requiring interactions with others. Although the  
undersigned has considered and accepts the Veterans  
Administration's conclusion of disability as of April 10,  
2003, the longitudinal record and the objective medical  
evidence of record do not support the claimant's  
assertion of disability prior to such date.

10 Id.

11 The problem with the ALJ's reliance on the April 10, 2003 date  
12 is that the date is tied to an application plaintiff made to the VA  
13 for an increase in his VA disability rating, based on, presumably,  
14 plaintiff's belief that his symptoms, obviously occurring before  
15 the application date, justified the increase. As plaintiff notes  
16 in his memorandum, there is nothing physically or emotionally that  
17 occurred to plaintiff on that date and thus, the date is arbitrary  
18 and not tied to the relevant evidence in the record. I agree with  
19 plaintiff.

20 Plaintiff's VA disability ratings have increased over time.  
21 E.g., Tr. 256 (Nov. 1996 request for review of an April 22, 1996  
22 examination refers to no rated disabilities as of time of request);  
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24 <sup>6</sup> Claudication is a reference to limping occurring from leg  
25 cramps caused by poor circulation and blockage of blood in leg  
26 arteries which produces an aching, tired, and sometimes burning  
27 pain the legs. The pain is brought on by exercise and relieved  
28 by rest. Symptoms often get worse over time. It can be caused  
by atherosclerosis (which in turn can occur for many reasons,  
including diabetes), or peripheral vascular disease.  
<http://www.nlm.nih.gov/medlineplus/ency/article/003184.htm>

351 (Jan. 13, 1997 award of 10% disability for PTSD effective March  
11, 1996, date of original disability claim); 348 (March 5, 1998  
increase in PTSD disability award from 10% to 30%, effective August  
12, 1997, date claim for increase received); 343 (July 22, 1999  
decision continuing the PTSD disability rating at 30%); Tr. 485-88  
(Mar. 25, 2003 rating decision awarding 20% disability for diabetes  
associated with herbicide exposure, effective May 8, 2001; awarding  
20% disability for left lower extremity peripheral neuropathy,  
effective May 8, 2001; and awarding 20% disability for right lower  
extremity peripheral neuropathy, effective May 8, 2001); Tr. 574-80  
(October 3, 2003 rating decision awarding 30% disability for left  
upper extremity peripheral neuropathy, effective Apr. 10, 2003;  
awarding 30% disability for right upper extremity peripheral  
neuropathy effective Apr. 10, 2003; increasing disability rating  
for left lower extremity peripheral neuropathy from 20% disabling  
to 40% disabling, effective Apr. 10, 2003; increasing disability  
rating for right lower extremity peripheral neuropathy from 20%  
disabling to 40% disabling, effective Apr. 10, 2003; and  
maintaining PTSD disability rating at 50%<sup>7</sup>).

The VA records reveal that typically, when a request for a  
rating increase is sought, the VA undertakes a review of medical  
records, may obtain additional medical evaluations and  
consultations, and then issues a decision. Notably, when the

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<sup>7</sup> The record does not appear to contain the actual decision  
increasing the PTSD rating from 30% to 50% but clearly, if the  
October 3, 2003 rating decision refers to maintaining the 50%  
rating, the rating increased to 50% sometime between March 1998,  
when the 30% was initially awarded (and which was effective as of  
August 1997), and October 2003.

1 rating is increased, the increase is made effective as of the date  
2 the claimant applied for the increase.

3 As the ALJ noted in his decision, on April 10, 2003, plaintiff  
4 filed a claim with the VA for increased benefits. Tr. 30. The  
5 decision on that claim was issued in October 2003, but was  
6 effective as of the date the claim was filed. Tr. 31, 574-80. The  
7 ALJ further noted that the VA's impairment rating did not indicate  
8 that plaintiff's physical impairments had limited him to sedentary  
9 work until April 2003. Tr. 36. The ALJ then concluded that,  
10 "giving consideration to the conclusions of the Veterans  
11 Administration, the undersigned concludes that the claimant was  
12 limited to sedentary work as of April 10, 2003 due to difficulty  
13 with walking and/or standing." Id. "However, prior to that time,  
14 the record as a whole indicates that the claimant remained active  
15 and was able to stand and/or walk during much of the day." Id.

16 The problem with the ALJ's reliance on the VA's impairment  
17 rating decision is that the VA's effective date is based entirely  
18 on the date plaintiff submitted his claim for a rate increase. The  
19 date has no direct correlation to the underlying medical evidence.  
20 Clearly, the VA determined that medical evidence supported the rate  
21 increase as of that date. However, it is not determinative of  
22 whether plaintiff may have been disabled, for purposes of the  
23 Social Security Act, before that date. For example, if plaintiff  
24 had filed his rate increase claim in January 2003<sup>8</sup>, or in July  
25 2002, the VA may well have made the rate increase effective as of

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27 <sup>8</sup> An electromyogram (EMG) performed in January 2003 showed  
28 moderate to severe peripheral neuropathy. Tr. 29.

1 either of those dates. Then, the ALJ might have concluded that  
2 plaintiff was disabled for the purposes of Social Security as of an  
3 earlier time. The point is that the VA's effective date is  
4 arbitrary, in the sense that it is tied to the act of filing a  
5 claim and is not related to the underlying evidence demonstrating  
6 when the claimant's impairments actually became disabling.

7 Thus here, while the ALJ discusses some of the medical  
8 evidence, it is clear from his decision that he relied heavily on  
9 the VA's April 10, 2003 disability rate increase effective date to  
10 determine plaintiff's disability status under the Social Security  
11 Act. Because that date is not reflective of the actual medical  
12 evidence, it was error for the ALJ to rely on it.

13 Moreover, as the Ninth Circuit has held, Social Security  
14 Ruling (SSR) 83-20 requires the ALJ to call upon the services of a  
15 medical advisor to assess the onset date in cases such as this.  
16 SSR 83-20 addresses determinations of onset date in disabilities of  
17 non-traumatic origin. SSR 83-20 (located at 1983 WL 31249). In  
18 the first instance, the onset determination involves consideration  
19 of the applicant's allegations, work history, if any, and the  
20 medical and other evidence concerning impairment severity. Id. at  
21 \*2. "The medical evidence serves as the primary element in the  
22 onset determination." Id.

23 The ruling explains that

24 [w]ith slowly progressive impairments, it is sometimes  
25 impossible to obtain medical evidence establishing the  
26 precise date an impairment became disabling. Determining  
27 the proper onset date is particularly difficult, when,  
28 for example, the alleged onset and the date last worked  
are far in the past and adequate medical records are not  
available. In such cases, it will be necessary to infer  
the onset date from the medical and other evidence that  
describe the history and symptomatology of the disease

1 process.

2 Id.

3 The regulation further notes that in many cases, precise  
4 evidence of onset date will not be available and instead, the ALJ  
5 will need to infer an onset date from the available medical  
6 evidence. Id. at \*3. "How long the disease may be determined to  
7 have existed at a disabling level of severity depends on an  
8 informed judgment of the facts in the particular case." Id.  
9 Notably, the rule then provides that "[a]t the hearing, the [ALJ]  
10 should call on the services of a medical advisor when onset must be  
11 inferred." Id.

12 The Ninth Circuit has held that the regulation's reference to  
13 "'should' means 'must.'" Armstrong v. Commissioner, 160 F.3d 587,  
14 590 (9th Cir. 1998) (citing DeLorme v. Sullivan, 924 F.2d 841, 848  
15 (9th Cir. 1991)). As explained in DeLorme: if the "medical  
16 evidence is not definite concerning the onset date and medical  
17 inferences need to be made, SSR 83-20 requires the administrative  
18 law judge to call upon the services of a medical advisor and obtain  
19 all evidence which is available to make the determination."  
20 DeLorme, 924 F.2d at 848. The ALJ erred by not calling a medical  
21 advisor to assist in the determination of plaintiff's onset date.

22 According to the ALJ, prior to April 10, 2003, plaintiff was  
23 apparently able to engage in medium exertion work, with the  
24 residual functional capacity to lift and carry fifty pounds  
25 occasionally and twenty-five pounds frequently, to sit for six  
26 hours in an eight-hour workday, and to stand and/or walk for six  
27 hours in an eight-hour workday, and then, the very next day,  
28 plaintiff's condition deteriorated to the point where he could



1 engage in only sedentary work. This scenario is completely  
2 inconsistent with the progressive nature of plaintiff's  
3 impairments, which more likely than not, produced a more gradual  
4 reduction in plaintiff's physical capacities.

5 CONCLUSION

6 The Commissioner's decision is reversed and remanded to the  
7 ALJ for the limited purpose of determining, with the assistance of  
8 a medical advisor, the appropriate onset date of plaintiff's  
9 disabling impairments.

10 IT IS SO ORDERED.

11 Dated this 10th day of April, 2006.

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14 /s/ Dennis James Hubel  
15 Dennis James Hubel  
United States Magistrate Judge  
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